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No. 56419-0-II

**Court of Appeals, Div. II,
of the State of Washington**

Patricia Landes,

Respondent,

v.

Patrick Cuzdey,

Appellant.

Corrected Brief of Appellant

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1. Introduction

In its prior opinion, this Court held that there were genuine issues of fact as to whether Cuzdey's remaining on the land he had possessed for decades or his payment of rent while simultaneously stating that he did not admit to being a tenant and was paying under protest constituted performance or mutual assent to the offered rental agreement. This Court's decision was premised on evidence of the context of Cuzdey's long history with the Property and the quiet title action, appeal, and supersedeas proceedings that were occurring at the time of the alleged contract formation. The objective manifestation theory of contracts and the context rule demand that such evidence be considered to determine the intent of the parties as to acceptance and mutual assent.

The trial court excluded all evidence of the history of the Property, the quiet title litigation, and

even the court order expressly referenced in Cuzdey's protest letter. This exclusion of evidence deprived the jury of any ability to determine the nuanced factual issues that this Court identified in its prior Opinion.

To make matters worse, the trial court instructed the jury that if it found Cuzdey remained on the Property or paid rent, those acts automatically constituted performance on the unilateral contract offer. The trial court's instructions misstated the law, misled the jury, and deprived the jury of its discretion to determine as a question of law whether, in the context of all of the evidence, Cuzdey's acts did or did not constitute acceptance or mutual assent to the offered rental agreement.

This Court should reverse the trial court's erroneous rulings and instructions, vacate the judgment and writ, and remand for a new trial.

2. Assignments of Error

Assignments of Error

1. The trial court failed to comply with this Court's earlier decision in *Landes v. Cuzdey*, 10 Wn. App. 2d 1002, 2019 WL 3938726 (2019) (unpublished). *See* RAP 12.9(a).
2. The trial court erred in excluding all evidence of Cuzdey's history with the Property; the quiet title action, appeal, and supersedeas proceedings; and the court order referenced in Cuzdey's protest letter.
3. The trial court erred in giving Jury Instruction No. 5, subsections (2) and (3).
4. The trial court erred in awarding Landes double damages under RCW 59.12.170.
5. The trial court erred in awarding Landes attorney's fees under the contract and RCW 59.18.410(1).
6. The trial court erred in entering Finding 1.2 at CP 575, which states, "Plaintiff(s) rented to Defendant(s) the premises above described and Defendant(s) occupied the premises at the rate stated in the unilateral contract and rental agreement."
7. The trial court erred in entering Finding 1.3 at CP 575, the portion which reads,

“Defendant(s) ... is/are now unlawfully detaining the premises.”

8. The trial court erred in entering Finding 2.1 at CP 730, specifically the portion which reads, “The facts of this case (and contract at issue) support an attorney fee award.”

Issues Pertaining to Assignments of Error

1. Did the trial court err in excluding evidence relevant to the context of the alleged contract formation? (assignments of error 1, 2, 6, 7)
2. Did the trial court err in giving Jury Instruction No. 5? (assignments of error 1, 3, 6, 7)
3. Did the trial court err in awarding double damages? (assignments of error 4, 8)
4. Did the trial court err in awarding attorney’s fees? (assignments of error 5, 8)

3. Statement of the Case

This is the second appeal arising from this unlawful detainer action and the third between these same two parties relating to ownership or possession of the Property. The underlying background can be found in *Cuzdey v. Landes*, 198 Wn. App. 1033, 2017 WL 1314218 (2017) (unpublished), and *Landes v. Cuzdey*, 10 Wn. App. 2d 1002, 2019 WL 3938726 (2019) (unpublished). This brief will provide a relevant summary of that background, with citations to these prior opinions and to the trial court record for this appeal.¹

¹ The Verbatim Reports of Proceedings are not labeled by volume or numbered consecutively. This brief will cite to the reports of the August 9-12, 2021, trial (reported by Ralph Beswick, labeled Volume 1 and Volume 2) as simply “RP”. Other reports will be cited according to the date of the hearing, for example, “RP (1/21/22)” for the report of the January 21, 2022, hearing on damages and attorney’s fees.

3.1 Cuzdey's long history on the Property is part of the context surrounding the alleged rental agreement at issue in this case.

Landes purchased the Property, a five-acre parcel in Thurston County, in 1983. *Cuzdey*, at *1; *Landes*, at *1; CP 735; *see* RP 116. Cuzdey and his then-wife (Landes' daughter) moved onto the property in 1984. *Cuzdey*, at *1; *Landes*, at *1; CP 735; RP 187. Cuzdey believed that Landes promised to transfer the Property to Cuzdeys in return for a combination of cash and labor Cuzdey performed on other property that belonged to Landes. *Cuzdey*, at *1; CP 735-36. Landes also purchased a Nova mobile home for Cuzdeys in 1985, for which Cuzdeys made all payments to the bank and paid the personal property taxes. *Cuzdey*, at *1; *Landes*, at *1; CP 735-36.

Cuzdeys lived on the Property alone from 1984 to 1997. *Cuzdey*, at *1; CP 736; *see* RP 120, 187. During that time, Cuzdey cleared land and built a barn, a shop for his business, and a utility building. CP 736. His

business included operating and repairing heavy equipment and maintaining an extensive inventory of materials and tools. CP 736; *see* RP 231.

Landes moved onto the Property in 1997 in a new mobile home. *Cuzdey*, at *1; CP 736; RP 120. From 1997 to 2014, the parties lived peacefully, and Cuzdey believed that all parties were honoring the family agreements regarding the Property. CP 736. Neither party charged rent to the other for living on the Property. CP 736.

3.2 The parties were in the midst of contentious litigation over ownership and possession of the Property when Landes made her unilateral offer of a rental agreement.

In 2014, Cuzdey and his wife divorced. *Cuzdey*, at *2; *Landes*, at *1; CP 736; RP 104. Landes claimed ownership of the Property and sought to evict Cuzdey. *Cuzdey*, at *2; *Landes*, at *1; CP 736; *see* RP 105. Cuzdey sued to quiet title, arguing that he had obtained the Property from Landes through the oral

agreement and the doctrine of part performance.

Cuzdey, at *2; *Landes*, at *1; CP 736. Landes admitted that Cuzdey had paid for the Nova but denied the existence of any oral contract for the Property. *Cuzdey*, at *2. The trial court dismissed Cuzdey's claims in August 2015, quieting title to the Property in Landes. *Cuzdey*, at *2; *Landes*, at *1; CP 736. Cuzdey obtained an order from the trial court staying the decision for 60 days if Cuzdey filed an appeal, posted a bond of \$36,000, and paid rent of \$1,500 per month for the months of August and September 2015. *Landes*, at *1; CP 736-37; Ex. 502. Cuzdey did file an appeal but did not immediately post a bond or pay rent in August or September. *Landes*, at *1; CP 737.

In October 2015, Landes filed a complaint for unlawful detainer. *Landes*, at *2; *see* CP 737. That action was dismissed by agreement to allow for a hearing on the amount for a supersedeas bond in the quiet title action. *Landes*, at *2.

On November 16, 2015, Landes served Cuzdey with a “Notice to Begin Rental Pursuant to Chapter 59.18 RCW.” *Landes*, at *2; CP 737; RP 105, 110; Ex. 1.

The notice stated,

1. On or after January 1, 2016, your non-exclusive possession and occupancy of the subject premises will be considered a month-to-month tenancy subject to the provisions of the Residential Landlord-Tenant Act, RCW 59.18.
2. Rent will be charged for your possession and occupancy of the subject premises, at the rate of \$1,500.00 per month, payable in advance on or before the first day of each month, beginning January 1, 2016.

Ex. 1. Cuzdey did not immediately respond to this notice. *Landes*, at *2.

3.3 While Cuzdey gathered supersedeas funds, he made payment to Landes under protest, rejecting the offered rental agreement.

In December, the trial court set a supersedeas amount in the quiet title case of \$75,000. *Landes*, at *2.

In early January, Cuzdey had not yet posted

supersedeas, and Landes served him with a “pay or vacate” notice under the alleged rental agreement. *Landes*, at *2. Cuzdey believed that he still had the option or obligation under the prior court order to obtain a temporary stay by paying two months rent while he gathered the funds for the full supersedeas. CP 737; RP 202, 229.

On January 19, Cuzdey delivered to Landes’ attorney money orders totaling \$1,500 and a “protest letter,” which the attorney accepted. *Landes*, at *2; RP 202, 230; CP 737; Ex. 501. The protest letter stated,

I received your notice on 1.14.2016 at approximately ____.

I have appealed the judgment quieting title and do not admit to being a tenant of Landes. I am paying under protest and under order of the superior court and reserve all of my rights, claims and arguments for purposes of the appeal and remand of the case.

I further reserve the right to seek reimbursement of the payment if/when I prevail on appeal.

Attached is a money order satisfying your demand for rent in the amount of \$1,500.00 payable to Patricia Landes.

Ex. 501; RP 204. Landes apparently did not receive the protest letter from her attorney, but she did cash the money orders, believing that they satisfied her unilateral contract offer. RP 123-24. Cuzdey believed that her cashing the money orders meant she accepted the terms of his protest. RP 231. The next month, Cuzdey paid another \$1,500 by check, on which he wrote, “ ‘rent’ for Feb 2016.” Ex. 2; *Landes*, at *3.

3.4 After this Court affirmed Landes’ ownership of the Property, Landes initiated this action to evict Cuzdey under the alleged rental agreement.

Cuzdey posted a supersedeas bond for the appeal of the quiet title decision in March 2016. *Landes*, at *3. In April 2017, Division One of this Court affirmed the dismissal of Cuzdey’s claim to the Property but reversed dismissal of his claim to the Nova mobile home. *Landes*, at *3; CP 737.

In October 2017, Landes asserted that the alleged rental agreement was still in effect and served Cuzdey with another “pay or vacate” notice. *Landes*, at *3. She initiated this unlawful detainer action in November 2017, claiming that the “Notice to Begin Rental” and Cuzdey’s remaining on the property and paying rent created a valid rental agreement. *Landes*, at *3; CP 3-5. Cuzdey argued that an unlawful detainer action was improper because he was a tenant at will, without an enforceable rental agreement. *Landes*, at *3.

In a show cause hearing, the trial court found that there was a rental agreement. *Landes*, at *3. Cuzdey appealed. *Landes*, at *4.

3.5 On appeal of the eviction, this Court remanded for a trial to resolve issues of fact on whether Cuzdey’s actions constituted acceptance and mutual assent to the terms of the unilateral contract offer.

On appeal, Cuzdey argued that he was not a “tenant” under either Chapter 59.12 RCW or Chapter

59.18 RCW because there was no rental agreement for any specific term. *Landes*, at *4. Landes argued that Cuzdey had accepted her unilateral offer of a month-to-month tenancy. *Landes*, at *4. This Court held that “Cuzdey presented issues of fact regarding whether he was a ‘tenant’ under the unlawful detainer statute that must be tried to a jury.” *Landes*, at *4.

Knowing most of the above historical context, this Court held, “the issue is whether Landes’s November 2015 Notice to Provide Rental and Cuzdey’s actions following that notice converted the initial tenancy at will that was not subject to the unlawful detainer statute to a month-to-month tenancy that was subject to the unlawful detainer statute. We hold that questions of fact regarding the formation of a rental agreement precluded entry of an unlawful detainer judgment and required a trial by jury...” *Landes*, at *6.

Conceiving of Landes’ notice as a unilateral contract offer, this Court set forth the basic legal

principles governing unilateral contracts. *Landes*, at *6-7. The Court noted the essential elements of offer, acceptance, consideration, and mutual assent under the objective manifestation theory of contracts. *Landes*, at *6. The Court emphasized, “the mutual assent of the parties must be gleaned from their outward manifestations. To determine whether a party has manifested an intent to enter into a contract, we impute an intention corresponding to the reasonable meaning of a person’s words and acts.” *Landes*, at *6 (quoting *Multicare Med. Ctr. v. Dept. of Soc. and Health Servs.*, 114 Wn.2d 572, 587, 790 P.2d 124 (1990)). The Court noted that the existence of mutual assent is a question of fact. *Landes*, at *7.

In answer to *Landes*’ argument that Cuzdey accepted the unilateral contract by staying on the Property past January 1, 2016, this Court recognized that because “Cuzdey already had been living on the property for decades ... [m]erely remaining on the

property does not *necessarily* reflect an intent to perform on the offer.” *Landes*, at *8 (emphasis in original). On the other hand, this Court also noted that because Cuzdey, in January 2016, had not yet posted supersedeas for the quiet title appeal, it could be inferred that he intended to perform in order to avoid being ejected from the Property. *Landes*, at *8. Given the complete context, this Court held, “We conclude that the evidence creates a genuine issue of fact regarding mutual assent—whether Cuzdey performed on Landes’s unilateral contract offer by remaining on the property where he had lived for years. Therefore, a jury trial is required on this issue...” *Landes*, at *8.

Similarly, in answer to Landes’ argument that Cuzdey accepted the unilateral contract by paying rent in January and February, this Court noted that Cuzdey arguably did not accept because “he expressly stated in his letter that he did not admit to being Landes’s tenant, he was paying under protest, and he was

paying under court order.” *Landes*, at *9.² At the same time, Cuzdey arguably did accept by paying the required rent and noting, “Attached is a money order satisfying your demand for rent.” *Landes*, at *8. With an understanding of the context of Cuzdey’s actions, this Court held, “because Cuzdey did not simply perform on Landes’s offer without any limitations ... [w]e conclude that the evidence creates a genuine issue of fact regarding mutual assent—whether Cuzdey performed on Landes’s unilateral contract offer by paying the offered rent amounts while stating that he did not admit to being a tenant and was paying under protest. Therefore, a jury trial is required on this issue...” *Landes*, at *9.

² While this Court noted, at n.4, that Cuzdey was not actually, at the time, required by any court order to pay rent to Landes, this Court did not suggest that Cuzdey’s assertion of a court order, or the asserted court order itself, should be removed from the jury’s consideration on remand.

“In summary, questions of fact exist regarding whether a rental agreement was formed and therefore whether the unlawful detainer statute applies in this case. Accordingly, we hold that the trial court erred in entering judgment in favor of Landes in the unlawful detainer action.” *Landes*, at *9.

3.6 On remand, the trial court’s pre-trial order in limine and rulings on objections during trial prevented the jury from hearing the context surrounding the unilateral contract offer.

On remand, Landes moved in limine to restrict the evidence to prevent Cuzdey from attempting to establish any claim of ownership or possessory interest in the Property other than tenant-at-will, to exclude any assertion that Cuzdey paid rent pursuant to any court order, to exclude the court order itself, and to exclude “any testimony or evidence that is not material to the four issues this Court previously ordered are to

be decided at trial.”³ CP 126. Landes argued that Cuzdey should not be permitted to suggest that he was actually under court order to pay rent when this Court already determined that he was not. CP 414; RP 85.

Cuzdey argued that the motion would prevent him from being able to explain his position or put on a defense. CP 324. He argued that he was not attempting to prove any ownership interest; rather, the history of his 30-year presence on the Property, the fact of his prior claim to title, and the procedural facts of the quiet title litigation, including the court order under which he asserted he was paying, were “important context” for the jury to determine whether there was a rental agreement in place. CP 325, 327; RP (7/23/21) 39, 47. He argued that his protest letter could not be

³ Those four issues were whether there was a rental agreement; whether this action is properly an unlawful detainer action; whether Chapter 59.18 RCW or Chapter 59.12 RCW applied; and, in the alternative, whether Cuzdey was a trespasser. CP 115-16.

fully explained to the jury without at least being able to testify about the court order mentioned in the letter. CP 424-25; RP (7/23/21) 47; RP 86.

The trial court granted the motion and barred any testimony or evidence regarding, among other things, “Factual happenings that occurred prior to the unilateral contract/rental agreement offer or promise.” CP 408-09. The trial court also excluded Cuzdey’s Exhibit 502, the court order referenced in his protest letter. CP 409.

The trial court reasoned that because ownership or financial claims were not relevant to the limited issues for trial, any testimony “prior to the unilateral contract that was offered” was irrelevant to the question of whether a rental agreement was formed and must be excluded. RP (7/23/21) 57. The trial court excluded the court order as an exhibit because “a jury should not be interpreting court orders,” but allowed

Cuzdey to testify “regarding his mistaken belief” about the order. RP 86-87.

The effect of the order in limine was, as Cuzdey had argued, to prevent him from presenting any of the context surrounding the making of the unilateral contract offer and his actions in response to it. The trial court did not allow Cuzdey to testify regarding how he first came to the Property, why, or what he did when he arrived. RP 172-77. The trial court did not allow Cuzdey to testify regarding the 2014 attempted eviction or the quiet title litigation. RP 188-90.

Although the trial court recognized that “the jury needs some sort of context,” the trial court also expressed that “I am not sure how it’s going to come up in a way that is not objectionable in this court,” and “the court also fully expects that its orders will be complied with.” RP 190.

3.7 The jury received a much more limited set of facts than this Court had considered on appeal.

Because of the limitations imposed by the trial court, the jury received a much more limited set of facts than this Court had considered in the prior appeal. What follows is a compilation of the facts received by the jury that are relevant to the issues in this appeal.

Patricia Landes testified that she owns and lives on the Property, a large parcel near Olympia. RP 105, 116-18. In 2014, Cuzdey also lived there with his wife, Landes' daughter. RP 105. In the spring of 2014, Cuzdey and Landes' daughter were divorced. RP 105. Immediately after the divorce, Landes asked Cuzdey to leave the Property but he did not. RP 106. In November 2015, Landes offered to allow Cuzdey to stay on the property and pay monthly rent of \$1,500 beginning January 1, 2016. RP 110, 114; Ex. 1. The "Notice to Begin Rental," quoted in relevant part in

Part 3.2, above, was admitted and published to the jury. RP 111. Landes testified that Cuzdey stayed on the property past January 1, 2016, and paid rent in January and February. RP 112-15; Ex. 2.

On cross-examination, Landes testified that she has lived at the Property since 1997, and Cuzdey lived there about one year before. RP 120-21. Cuzdey never had to pay rent before the divorce. RP 121. Landes denied ever seeing Cuzdey's protest letter, but she did receive and cash the checks. RP 123.

Tery Landes testified to facts relevant to trespass and damages. *See, generally*, RP 130-42.

Patrick Cuzdey testified that he moved onto the Property in 1984. RP 187. Landes demanded rent starting in 2016. RP 202. Cuzdey did not feel he owed her any rent, but he did believe that he was ordered by the court to pay rent for a 60-day period to hold off eviction. RP 202. Cuzdey delivered the first month's rent to Landes' attorney, accompanied by a protest

letter, which he insisted must be accepted before he would make payment. RP 202; Ex. 501. Cuzdey testified that Landes' attorney accepted the letter. RP 202, 230. The protest letter, quoted in Part 3.3, above, was admitted into evidence and published to the jury. RP 203. Cuzdey testified that he would not have made the payments if he had not believed he was under court order to do so. RP 229. He never intended to accept Landes' rental agreement. RP 229.

After the close of evidence, the jury was instructed that Cuzdey "is not an owner of [Landes'] real property," and that Cuzdey "was not required by a court order to pay rent to [Landes] at the time she made a unilateral contract offer." CP 455.

In summary, the jury was given Landes' unilateral contract offer, Cuzdey's payments and his protest letter, and little else. The only context the jury received to help them understand the alleged contract formation was that Cuzdey had lived on the Property

since either 1984 or 1996 and Landes since 1997; that in 2014 Landes asked Cuzdey to leave but he did not; that Cuzdey had never had to pay rent before then; and that at the time of his protest letter, Cuzdey believed that he was under some court order to pay but really he was not.

The jury wanted more background information, proposing the following questions for Cuzdey:

- Why wasn't the land in [Cuzdey's] name if he was there before [Landes]? CP 433.
- Did [Cuzdey] ever own the land in question? CP 434.
- What is the nature of the agreement that allowed [Cuzdey] to stay on the property? CP 435.
- What court order? CP 436.

Having been repeatedly admonished about following the trial court's order in limine during Cuzdey's testimony, Cuzdey's counsel agreed that these questions could not be asked. *See* RP 249-50.

3.8 The trial court's instructions to the jury removed any discretion regarding whether a contract was formed.

Cuzdey initially proposed a set of pattern instructions that would have asked the jury to determine the question of contract formation based on finding offer, acceptance, consideration, and mutual assent:

[Proposed] Jury Instruction No. 6 [Contract]

A contract is a legally enforceable promise or set of promises. In order for a promise or set of promises to be legally enforceable, there must be mutual assent and consideration.

...

[Proposed] Jury Instruction No. 7 [Mutual Assent]

In order for there to be mutual assent, the parties must agree on the essential terms of the contract, and must express to each other their agreement to the same essential terms.

...

[Proposed] Jury Instruction No. 8
[Consideration]

If you find that there is any act;
forbearance; creation, modification, or
destruction of a legal relationship; or a
return promise given in exchange for a
promise, then there was consideration.

CP 349-51.

At the urging of the trial court, the parties agreed to most of Landes' "Amended Proposed Written Jury Instructions." RP 88-89 (referring to CP 816-34⁴). This set included the "Contract" instruction quoted above, with the addition of, "A unilateral contract consists of a promise only on the part of the offeror, and performance of the required terms by the offeree." CP 825. It added an instruction defining a promise. CP 826. It included the same "Mutual Assent" instruction quoted above. CP 827. It modified the "Consideration"

⁴ All CP numbers above 815 are part of a supplemental designation of clerk's papers filed the same day as this brief and represent Cuzdey's best guess as to the numbers that will be assigned by the trial court clerk. After the supplemental clerk's papers are filed, Cuzdey will amend this brief if necessary to correct any errors.

instruction to specifically state that either paying rent or staying on the property past January 1, 2016, would constitute consideration. CP 828.

The trial court prepared its own draft set of instructions based on the agreed instructions and then discussed those changes and other outstanding concerns with the parties. RP 286-87. The trial court proposed that there needed to be an instruction on the elements of contract formation and a separate instruction on the elements of breach. RP 300. The trial court provided an instruction for contract formation that eventually took the following form:

Instruction No. 5 [Elements]

The Plaintiff has the burden of proving each of the following propositions to prove that a unilateral contract existed between the Plaintiff and the Defendant:

- (1) That Plaintiff made a unilateral contract offer or promise to Defendant; and
- (2) That Defendant substantially performed on the terms of the Plaintiff's unilateral contract promise by (a) non-exclusively

occupying or using Plaintiff's real property on or after January 1, 2016, or (b) by paying rent as offered by Plaintiff on or after January 1, 2016; and

(3) That there was mutual assent, meaning Plaintiff and Defendant's reasonable actions and words at the time of the unilateral contract promise demonstrated an intent to substantially perform on the terms of Plaintiff's unilateral contract promise. In determining intent to substantially perform on Plaintiff's unilateral contract promise, you must look at the plain language of the unilateral contract promise and consider the parties' reasonable words and actions, disregarding the parties' unexpressed personal feelings, prejudices, interpretations, or mental perceptions; and

(4) That there was consideration. Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange. If you find that Defendant performed on the unilateral contract promise by occupying or using Plaintiff's real property on and past January 1, 2016, or that Defendant paid rent to Plaintiff pursuant to the unilateral contract promise, or that any other act, benefit gained, or forbearance by Defendant constituted

performance on the unilateral contract promise, then there was consideration.

If you find from your consideration of all the evidence that each of these propositions has been proved, your answer to Question #1 on the Special Verdict Form must be “Yes”. On the other hand, if you find from your consideration of all the evidence that each of these propositions has not been proved, your answer to Question #1 on the Special Verdict Form must be “No”.

RP 304 (trial court presents its draft instruction); CP 456-57 (final language of the instruction). The parties added an instruction addressing unilateral contracts: “A party receiving a unilateral contract offer or promise may not make a counteroffer to the maker of the offer or promise. Rather, the recipient must either (1) accept the offer or promise by performance; (2) decline to perform; or (3) request a new offer or promise on different terms.” CP 460. The parties’ “Contract” instruction remained, CP 459, but the “Mutual Assent” and “Consideration” instructions were removed as

redundant to the trial court's "Elements" instruction, RP 320-21.

3.9 Consistent with the instructions and the limited evidence, the jury found that Cuzdey accepted and then breached the unilateral contract.

In closing, Landes argued that the jury should disregard Cuzdey's protest letter as mere subjective intent. RP 399. She argued that no matter what Cuzdey said in the protest letter, he performed the terms of the unilateral contract offer by staying on the Property and by paying rent, referring to part (2) of the "Elements" instruction quoted above. RP 397-98.

Cuzdey argued that the protest letter was the key, showed that there was no mutual assent to the offered rental agreement, and without mutual assent there is no contract. RP 414.

The jury found that Cuzdey did enter into a unilateral contract for the use of the Property. CP 447. The jury found that Cuzdey breached that contract. CP

447. The jury found that Cuzdey owed back rent of \$97,500. CP 448.

Based on the jury's verdict, the trial court ordered the issuance of a writ of restitution. CP 576. Cuzdey moved to reduce the amount of the jury verdict as inconsistent with the evidence that Cuzdey had been absent from the property for two years during the prior appeal, CP 552-53, but the trial court denied the motion, CP 586.

Out of an abundance of caution, Cuzdey filed a premature appeal of the yet-to-be-ordered final judgment, specifically designating these two orders and including any subsequent final judgment or orders. CP 588. This Court stayed the appeal pending issuance of final judgment.

3.10 The trial court awarded Landes double damages and attorney's fees.

Landes requested the trial court award double damages under RCW 59.12.170. CP 468. She also

requested an award of attorney's fees under the RLTA, RCW 59.18.410, arguing that the statute was incorporated into the rental agreement by reference. CP 469, 573. Cuzdey argued that the RLTA, and its attorney fee provision, cannot apply because the rental agreement found by the jury could only have been for the land, not for a "dwelling unit." CP 560, 620. While this essentially conceded the issue of doubling under RCW 59.12.170, it left open Cuzdey's argument that RCW 59.18.410 could not be incorporated into a rental agreement that did not qualify under the RLTA's own definitions. CP 727.

The trial court awarded double damages under RCW 59.12.170 and attorney's fees under the contract and entered final judgment. CP 729-31; RP (1/21/22) 8-9.

Cuzdey timely moved for a new trial. CP 772-76. He presented a declaration in which he testified to the historical background and other context relevant to

and surrounding the unilateral contract offer and his actions in response, as an offer of proof of what he would have testified but for the trial court's order in limine, which he argued had prevented him from having the trial that this Court intended. CP 735-37, 775. The trial court denied the motion. CP 809; RP (3/18/22) 69.

4. Argument

The trial court utterly failed to hold the jury trial envisioned by this Court's remand in the prior appeal. In remanding the case, this Court held that a jury must determine nuanced factual questions of acceptance and mutual assent—namely, whether Cuzdey's remaining on the land *on which he had resided for decades* and his payment of rent *while denying he was a tenant* constituted acceptance and mutual assent to the offered rental agreement. *Landes*, at *8-9. Through a combination of unreasonable evidentiary rulings and erroneous jury instructions, the trial court wiped away all nuance and presented the jury with this sanitized and over-simplified proposition: if Cuzdey remained on the land or paid rent, he accepted the unilateral contract.

If the proper question had been that simple, this Court would have answered in the last appeal. Instead, this Court presented nuanced questions of fact based

on the greater context surrounding Landes' offer and Cuzdey's response. Given the context of Cuzdey's decades-long residence on the Property, did his remaining on the Property actually represent acceptance of the rental agreement? Given the context of the ongoing litigation over the Property, the appeal and supersedeas proceedings, did Cuzdey's payment of "rent" actually mean he accepted the rental agreement?

The trial court's failure to present these nuanced questions to the jury was a failure to comply with this Court's prior Opinion in this case. *See* **RAP 12.9(a)** ("The question of compliance by the trial court may be raised by motion to recall the mandate, or by initiating a separate review..."). In this separate review of the deficient trial, this Court should reverse and vacate the judgment and writ of restitution and should remand for a proper trial.

This Brief will separately address each of the trial court's major failures. First, the trial court abused its discretion and failed to comply with this Court's Opinion when it excluded all evidence of the context of the alleged contract formation, stripping the jury of the information it needed to answer the nuanced questions presented by this Court's Opinion. Second, the trial court erred and failed to comply with this Court's Opinion when it instructed the jury that remaining on the Property and paying rent automatically constituted acceptance and mutual assent to the rental agreement, stripping the jury of any discretion to even consider the nuanced questions presented by this Court's Opinion. Finally, even if this Court upholds the trial and the resulting verdict, the trial court erred in awarding Landes her attorney's fees.

4.1 The trial court abused its discretion by excluding evidence of the context of the alleged contract formation.

First, the trial court abused its discretion in barring any evidence of the factual background necessary for the jury to properly understand Landes' offer and Cuzdey's response. The trial court unreasonably prevented the jury from hearing any historical context by excluding all evidence or testimony of "factual happenings that occurred prior to the unilateral contract/rental agreement offer or promise." CP 408. The trial court unreasonably prevented the jury from hearing any contemporaneous context by excluding the court order referenced in Cuzdey's protest letter and any discussion of the quiet title litigation (under the guise of barring any ownership or unjust enrichment claims). CP 408-09. By excluding all contextual evidence, the trial court unreasonably deprived the jury of the kind of information it needed to be able to make the nuanced

factual determinations that this Court specifically required a jury to make. This Court should reverse the trial court's exclusion of evidence, vacate the judgment and writ, and remand for a new trial.

4.1.1 Legal principles

4.1.1.1 Exclusion of evidence under ER 401-403

The trial court excluded contextual evidence under the mistaken notion that such evidence was not relevant to the question of contract formation. *See* RP (7/23/21) 56-58. The trial court was also concerned that the contextual evidence would be confusing to the jury. *See* RP 181, 185.

Generally speaking, relevant evidence is admissible and irrelevant evidence is inadmissible. **ER 402.** Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” **ER**

401. But even relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of ... confusion of the issues, or misleading the jury...” **ER 403**. This portion of the rule is intended to allow the trial court to avoid distracting “side issues.” *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 253, 722 P.2d 819 (1986).

This Court reviews a trial court’s decision on admissibility of evidence under these rules for abuse of discretion. *State v. Barry*, 184 Wn. App. 790, 801-02, 339 P.3d 200 (2014). A trial court abuses its discretion when its decision (1) is manifestly unreasonable because it adopts a view that no reasonable person would take, (2) is based on untenable grounds because it rests on facts unsupported in the record, or (3) is made for untenable reasons because it was reached by applying the wrong legal standard. *Id.*; *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

In balancing probative value against possibility of confusion, the court's considerations include "the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction." *State v. Bedada*, 13 Wn. App. 2d 185, 193-94, 463 P.3d 125 (2020). A trial court must articulate its reasoning on the record, but failure to do so may be harmless if the record as a whole permits appellate review. *State v. Acosta*, 123 Wn. App. 424, 433, 98 P.3d 503 (2004).

Where the evidence at issue is "undeniably probative of a central issue in the case," the ability of the danger of confusion to substantially outweigh the probative force of the evidence is "quite slim." *Sisley v.*

Seattle Sch. Dist. No. 1, 171 Wn. App. 227, 232, 286 P.3d 974 (2012). In such situations, “courts have long recognized that limiting instructions are a readily available means by which to mitigate whatever [confusion] might otherwise result... Thus, the calculation is clear: some evidence is so important that it must be admitted and limiting instructions are the mechanism by which unfair trials are avoided and prejudice minimized.” *Bedada*, 13 Wn. App. 2d at 198-99; see **ER 105**; e.g., *Maicke v. RDH, Inc.*, 37 Wn. App. 750, 754, 683 P.2d 227 (1984) (“In considering damages ..., you are instructed not to consider income taxes in any manner”).

4.1.1.2 Relevance of contextual evidence in contract cases

Unilateral contracts are different from bilateral contracts in that, in a unilateral contract, one party makes an offer and the other party can accept the offer only through performance of their end of the bargain.

Storti v. Univ. of Wash., 181 Wn.2d 28, 35-36, 330 P.3d 159 (2014). Substantial performance of the terms of the offer makes the unilateral promise enforceable. *Id.* at 37; *Higgins v. Egbert*, 28 Wn.2d 313, 317-18, 182 P.2d 58 (1947). On the other hand, an offeree cannot create an enforceable contract through performance that seeks to change the terms of the offer. *Higgins*, 28 Wn.2d at 318. To be enforceable, an alleged unilateral contract must satisfy traditional contract concepts of offer, acceptance, consideration, and mutual assent (also known as a meeting of the minds). *Storti*, 181 Wn.2d at 35-36; *Multicare Med. Ctr. v. Dept. of Soc. and Health Servs.*, 114 Wn.2d 572, 586-88, 790 P.2d 124 (1990).

In determining whether there was mutual assent, courts follow the objective manifestation theory of contracts. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005); *Multicare*, 114 Wn.2d at 586-87. “[T]he unexpressed subjective

intention of the parties is irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations. To determine whether a party has manifested an intent to enter into a contract, we impute an intention corresponding to the reasonable meaning of a person's words and acts." *Multicare*, 114 Wn.2d at 587. The analysis considers the outward manifestations of intent "made by each party to the other" and whether those outward manifestations objectively show an intent to agree to the contract. *Everett v. Sumstad's Estate*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981). The intent of the parties is a question of fact. *Pelly v. Panasyuk*, 2 Wn. App. 2d 848, 864, 413 P.3d 619 (2018).

Washington courts also follow the "context rule," which recognizes that "the intent of the contracting parties cannot be interpreted without examining the context surrounding the making of the contract." *Pelly*, 2 Wn. App. 2d at 865 (citing *Hearst*, 154 Wn.2d at 502;

Berg v. Hudesman, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990)). The court or jury may consider extrinsic evidence of the circumstances surrounding the making of the contract to ascertain the intent of the parties in entering into an agreement. *Hearst*, 154 Wn.2d at 502.

4.1.2 Analysis: Given this Court's prior Opinion in this case, it was manifestly unreasonable for the trial court to exclude evidence of the context surrounding Landes' unilateral contract offer and Cuzdey's response.

Under the objective manifestation theory and the context rule, it is impossible to interpret the meaning of the parties' objective manifestations without knowing the context surrounding the alleged contract formation. This context, which was known to the parties at the time, informed the manner in which they manifested their intent. Those manifestations can only be understood if the jury also has knowledge of the same context. Because the jury cannot determine the factual question of mutual assent without knowing the

context of the parties' objective manifestations, contextual evidence is undeniably probative of a central issue in the case.

This is especially true given this Court's prior Opinion in this case. This Court's prior Opinion specifically called out contextual evidence as creating genuine issues of fact regarding mutual assent. *Landes*, at *8-9. The issues of fact were created by contextual evidence that Cuzdey had lived continuously on the Property for decades, that he had lost the quiet title action, that he was appealing it but had not yet posted a bond, and that his protest letter claimed he was paying under court order. *Id.* This Court remanded for a jury to decide, as a question of fact, whether all of the evidence—the offer, the protest letter, and the contextual evidence—demonstrated mutual assent to the offered rental agreement. *Id.* Given this Court's directions in the Opinion, it was

manifestly unreasonable for the trial court to find that the contextual evidence was not relevant.

It was also manifestly unreasonable for the trial court to believe the probative value of the contextual evidence was outweighed by the slim chance that it might cause some confusion of issues. Cuzdey explained to the trial court that he was not making any claims of ownership or unjust enrichment but that he only wanted the jury to understand the context for his response to the unilateral contract offer. CP 325, 327; RP (7/23/21) 39, 47. It would have been easy for the parties to present the context evidence in that light—that the only issue was whether there was mutual assent and the contextual evidence was only offered to help the jury understand the meaning of Landes’ offer and Cuzdey’s response. That presentation could have easily been reinforced through a jury instruction to the same effect. There was little to no danger that the jury

would be confused into thinking there were ownership claims at stake in this trial.

The trial court was particularly concerned about the court order referenced in Cuzdey's protest letter, but this concern was also unreasonable. While it is true that a jury should not be called upon to determine the legal effect of a court order, this jury would not have been called upon to make that determination. The question for the jury was what Cuzdey meant by the words "I am paying under protest and under order of the superior court..." The jury naturally needed and wanted to know what court order Cuzdey was talking about. *See* CP 436. The court order itself, together with testimony on how it came about, was necessary context for the jury to be able to interpret Cuzdey's objective manifestations regarding the unilateral contract offer. The trial court abused its discretion in excluding the court order.

It is of note here that Landes has attempted to argue that the protest letter was merely Cuzdey's subjective intent. *See, e.g.*, RP 399. This argument is ludicrous. The letter was specifically written by Cuzdey to communicate his intent to Landes. Thus, it was not "unexpressed subjective intent." To the contrary, it was an objective manifestation of Cuzdey's response to the offer. The entirety of the protest letter must be considered, informed by the relevant context to explain the meaning of the words used.

The jury could not properly understand or decide the nuanced issues of mutual assent presented by this Court's prior Opinion without hearing evidence of the history of Cuzdey's presence on the land, the context of the quiet title litigation and appeal, and the trial court's stay order in that litigation. In light of this Court's prior Opinion, the trial court manifestly abused its discretion when it barred all such evidence. As a

result, the jury was left with even less information than this Court had during the prior appeal.

By barring evidence that was not only highly relevant but essential to the jury's understanding of the fact questions before it, the trial court abused its discretion. Rather than protecting the jury from possible confusion, the trial court's order *caused confusion* and prevented the jury from answering the very questions that had been remanded for its consideration. This Court should reverse the trial court's exclusion of evidence, vacate the judgment and writ, and remand for a new trial.

4.2 The trial court erred in instructing the jury that paying rent or staying on the property automatically constituted substantial performance of the unilateral contract terms.

Second, even if the jury had the proper evidence to determine the questions sent to it by this Court, the trial court took those questions away from the jury

through its erroneous instructions. In doing so, the trial court failed to comply with this Court's prior Opinion in this case. This Court should reverse the erroneous instructions, vacate the judgment and writ, and remand for a new trial.

4.2.1 Legal principles

A jury instruction must permit the parties to argue their theories of the case, must not mislead the jury, and must properly inform the jury of the applicable law. *Blaney v. Internat'l Assoc. of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004). Alleged errors of law in jury instructions are reviewed de novo. *Id.*

A jury instruction is improper when it denies the jury the discretion to determine a question of disputed fact. *Blaney*, 151 Wn.2d at 210-11. In *Blaney*, the trial court instructed the jury to calculate future earnings "from today until the time Ms. Blaney may reasonably be expected to retire." *Id.* at 210. The applicable law, in

contrast, was that future earnings should be calculated based on “a reasonably certain period of time that does not exceed the likely duration of the terminated employment.” *Id.* Because the applicable law allowed the jury the discretion to determine that “the likely duration of the terminated employment” might not extend to retirement, the instruction requiring calculation up to retirement denied the jury of its discretion and was therefore erroneous. *Id.* at 210-11.

4.2.2 Analysis: The trial court’s jury instructions erroneously deprived the jury of its discretion to determine the genuine factual issues presented by this Court’s prior Opinion.

The trial court’s instructions in this case denied the jury the discretion to determine the very questions that this Court remanded for the jury’s consideration. The trial court’s Instruction No. 5, subsection (2), instructed the jury that if Landes proved that Cuzdey remained on the Property or paid rent on or after

January 1, 2016, then Cuzdey substantially performed and accepted the unilateral contract:

The Plaintiff has the burden of proving...

(2) That Defendant substantially performed on the terms of the Plaintiff's unilateral contract promise by (a) non-exclusively occupying or using Plaintiff's real property on or after January 1, 2016, or (b) by paying rent as offered by Plaintiff on or after January 1, 2016...

CP 456.

This instruction removed any discretion that the jury would have had to consider the nuanced questions that this Court posed in its prior Opinion. Under this instruction, staying on the Property or paying rent automatically constituted acceptance of the unilateral contract offer. The jury was not free to find otherwise.

Yet this Court remanded the case specifically to give the jury the opportunity and discretion to decide one way or the other. This Court held that there were genuine issues of fact regarding whether Cuzdey

“remaining on the property where he had lived for years” or “paying the offered rent amounts while stating that he did not admit to being a tenant and was paying under protest” constituted performance on the unilateral contract offer. *Landes*, at *8-9. This Court made it clear that the jury should have the discretion to determine, as a question of fact, whether staying on the Property or paying rent actually constituted acceptance of the offer or whether those actions meant something else.

By depriving the jury of the discretion that this Court intended, the trial court erred as a matter of law and failed to comply with this Court’s prior Opinion in this case.

The trial court also erred in subsection (3) of the instruction. Subsection (3) misstated the law on mutual assent and the objective manifestation theory:

The Plaintiff has the burden of proving...

(3) That there was mutual assent, meaning Plaintiff and Defendant's *reasonable actions and words* at the time of the unilateral contract promise demonstrated an intent to substantially perform on the terms of Plaintiff's unilateral contract promise. In determining intent to substantially perform on Plaintiff's unilateral contract promise, you must look at the *plain language of the unilateral contract promise* and consider the parties' *reasonable words and actions*, disregarding the parties' unexpressed personal feelings, prejudices, interpretations, or mental perceptions...

CP 456 (emphasis added to highlight errors).

The instructions use of “reasonable actions and words” misstates the law and misleads the jury. Under the objective manifestation theory, “we impute an intention corresponding to the *reasonable meaning* of a person’s words and acts.” ***Multicare***, 114 Wn.2d at 587 (emphasis added). The difference is significant. Under the objective manifestation theory, we are stuck with the words and acts that the parties actually used; none can be disregarded. We determine the parties intent

from the reasonable, objective meaning of those words and acts.

In contrast, the instruction would allow the jury to completely disregard any words or acts that they feel were unreasonable in nature. Landes even made this argument in closing, encouraging the jury to disregard Cuzdey's words that he was paying under court order. RP 400 ("unreasonable to say that he's reserving all of his rights and paying under order of a superior court. He was not. It's unreasonable. People can say a lot of things. That's unreasonable."). Under the objective manifestation theory, a court or jury cannot simply ignore words that they deem unreasonable. Rather, the jury must give *reasonable meaning* to all of the words and acts used. The instruction misstated the law and misled the jury.

The instruction further misstated the law when it stated, "you must look at the plain language of the unilateral contract promise..." This statement implies

that only the offeror's promise matters in determining mutual assent. That is incorrect. The correct analysis considers the outward manifestations of intent "made by each party to the other" and whether those outward manifestations objectively show an intent to agree to the contract. *Everett*, 95 Wn.2d at 855. The analysis necessarily considers both sides.

As noted above, Landes has attempted to argue that the protest letter should be disregarded. *See, e.g.*, RP 399. This erroneous instruction supports that false notion. In truth, the protest letter was an integral part of Cuzdey's outward manifestations of his intent regarding the unilateral contract offer. Both Cuzdey's words in the protest letter and his actions must be considered, together with the offer, to determine whether there was mutual assent to enter into the rental agreement. The instruction misstated the law and misled the jury.

The trial court's Instruction No. 5, subsections (2) and (3) misstated the law, misled the jury, and deprived the jury of the discretion that this Court intended when it remanded the case for a jury trial. The Court should reverse the erroneous instructions, vacate the judgment and writ, and remand for a new trial.

4.3 The trial court erred in awarding attorney's fees under the contract's alleged incorporation of RCW 59.18.410.

Even if this Court upholds the trial court's evidentiary rulings and jury instructions, the trial court erred in awarding Landes her attorney's fees under the contract's alleged incorporation of RCW 59.18.410. The Court should reverse and vacate the award of attorney's fees.

4.3.1 Legal principles

"Attorney fees may be awarded only if authorized by contract, statute or recognized ground in equity."

Dankievitch v. Lawrence, ___ Wn. App. 2d ___, 513 P.3d 804, 811 (July 12, 2022). Whether a party is entitled to

an award of attorney's fees is a question of law reviewed de novo. *Durland v. San Juan Cnty.*, 182 Wn.2d 55, 76, 340 P.3d 191 (2014).

“If the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract.” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 801, 225 P.3d 213 (2009). In *Satomi*, the court held that arbitration clauses were incorporated by reference where the “warranty addenda” that contained the arbitration clauses also contained express incorporation language such as, “all provisions of this Warranty apply to all warranties from the Seller to the Purchaser,” or, “All disputes involving Seller, Buyer and/or Owners Association shall be resolved by the mediation/arbitration provisions of the Limited Warranty...” *Id.* at 790 n.4, 794 n.11, 801; accord *Cedar River Water and Sewer Dist. v. King County*, 178 Wn.2d 763, 784-85, 315 P.3d 1065 (2013)

(“the proposed Development Agreement is set forth in Exhibit A, which is attached hereto and incorporated herein”); *Woodward v. Emeritus Corp.*, 192 Wn. App. 584, 590-91, 595, 368 P.3d 487 (2016) (“arbitrations shall be administered in accordance with the procedures in effect for consumer arbitration adopted by the American Arbitration Association”). Whether a contract incorporates another document is a question of law reviewed de novo. *Major League Baseball Stadium Public Facilities Dist. v. Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 517, 296 P.3d 821 (2013).

Landes argued that the rental agreement incorporated the attorney fee provision of the RLTA, Chapter 59.18 RCW. In an unlawful detainer action under the RLTA, “the judgment shall be rendered against the tenant liable for the ... unlawful detainer ... for the rent, if any, found due... The court may also award reasonable attorneys’ fees as provided in RCW 59.18.290.” RCW 59.18.410(1). The cross-referenced

statute allows for a prevailing party attorney fee award except in circumstances not applicable here. **RCW 59.18.290.**

But the provisions of the RLTA cannot apply to rental of land for placement of a mobile home. *Parsons v. Mierz*, 3 Wn. App. 2d 1015, 2018 WL 1733519 (2018) (unpublished, cited as persuasive authority under GR 14.1). In *Parsons*, this Court reasoned that because the mobile home was owned by Mierz, Parsons could not have been renting Mierz a “dwelling unit” as defined in the RLTA. *Id.* at 2-3. Because the RLTA definitions of “landlord,” “tenant,” and “rental agreement” all refer to the rental of a “dwelling unit,” none of those definitions applied to Parsons, Mierz, or their agreement. *Id.* at 3. As a result, the RLTA did not apply. *Id.*

4.3.2 Analysis: The rental agreement could not incorporate the attorney fee provision of the RLTA.

The rental agreement could not incorporate the attorney fee provision of the RLTA. First, the RLTA, by its own terms, does not apply to an agreement to rent only land. Second, under Landes' theory of a unilateral contract, Cuzdey never promised to pay prevailing party attorney's fees under the RLTA.

Landes' Notice to Begin Rental provided, "your non-exclusive possession and occupancy of the subject premises will be considered a month-to-month tenancy subject to the provisions of the Residential Landlord-Tenant Act, RCW 59.18." Ex. 1.

Assuming for sake of argument that this language is sufficient to incorporate by reference the provisions of the RLTA, Landes may not, after the fact, pick and choose which provisions of the RLTA to incorporate. This language, if it incorporates anything, incorporates the entirety of the RLTA. That includes

the RLTA's definitions. Under the RLTA's definitions, as ably interpreted by this Court in *Parsons*, the RLTA itself cannot apply to an agreement to rent only land for placement of a mobile home. Landes has agreed that the rental agreement here was only for land. Thus, according to the provisions of the RLTA itself, the attorney fee provision does not apply.

This strange result occurs because at the time Landes extended the contract offer, title to both the land and the mobile home had been quieted in her. Her intent at that time must have been to rent both the land and the mobile home to Cuzdey. Such an agreement would have been subject to the RLTA. But when the first appeal placed ownership of the mobile home back in question, Landes changed her tune and argued that this agreement was for the land only. Such a change necessarily meant that the RLTA could no longer apply, rendering the attempted incorporation by reference of no effect. Because the RLTA cannot apply

to the rental agreement here, the trial court erred in awarding attorney's fees under the contract.

Second, under Landes' theory of a unilateral contract, Cuzdey, as offeree, could only accept through performance, not through making any promise. The only reason an attorney fee provision in a contract is enforceable is because both parties *promise* to abide by it and pay the fees to the prevailing party. Thus, under a unilateral contract theory, even if Cuzdey accepted the right to use the Property by remaining there and paying rent, he never made any promise to pay prevailing party attorney fees, nor could he, because the offeree of a unilateral contract cannot accept through making a promise. Because Cuzdey never promised anything, let alone that he would pay prevailing party attorney's fees, the trial court erred in awarding attorney's fees under the contract.

In the alternative, the Court should reverse and vacate the trial court's award of double damages, which

is fundamentally inconsistent with a determination that the rental agreement incorporated RCW 59.18.410(1). That statute provides, in addition to an award of attorney's fees, "the judgment shall be rendered against the tenant liable for the ... unlawful detainer ... for the rent, if any, found due..." **RCW 59.18.410(1)**. This is in contrast to **RCW 59.12.170**, which uses similar language but awards double damages: "the judgment shall be rendered against the defendant guilty of the ... unlawful detainer for twice the amount ... of the rent, if any, found due..."

If the rental agreement incorporated RCW 59.18.410(1), then the contract not only provided an award of attorney's fees but also limited Landes to recover single damages. Landes has been arguing all along that she was offering Cuzdey the full protections of the RLTA. If indeed the rental agreement successfully incorporated the RLTA, she should be held to all of those protections, including the limit of single

damages. The trial court's award of double damages was entirely inconsistent with finding that the RLTA attorney fee provision—the very same provision that provides only single damages—was incorporated into the contract. If this Court finds the RLTA was incorporated into the contract, the Court should also reverse and vacate the award of single damages, in order to maintain the integrity and consistency of the law.

The rental agreement could not incorporate the attorney fee provision of the RLTA. The Court should reverse and vacate the award of attorney's fees. In the alternative, the Court should reverse and vacate the award of double damages under RCW 59.12.410 as inconsistent with the contract's incorporation of the RLTA.

5. Conclusion

By barring any evidence of the context of the alleged contract formation and then instructing the jury that Cuzdey remaining on the land and paying the offered rent amount automatically equaled mutual assent to the contract, the trial court entirely eliminated the very issues that this Court remanded for jury trial. Because the trial court failed to hold the jury trial that this Court's Opinion required, this Court should reverse and remand for a retrial in which the jury will be equipped with both the evidence and the discretion to determine the genuine issues of fact that this Court's Opinion called for a jury to decide.

In the alternative, the Court should reverse and vacate either the award of attorney's fees or the award of double damages, depending on whether the RLTA was successfully incorporated into the contract.

I certify that this document contains 10,050 words.

Submitted this 19th day of October, 2022.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on October 20, 2022, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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SIGNED in Lacey, Washington this 20th day of October, 2022.

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